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15 UNITED STATES DISTRICT COURT
16
17 NORTHERN DISTRICT OF CALIFORNIA
18
19 OAKLAND DIVISION

20 OMEGA CAPITAL INVESTORS, L.P., et al.,) Case No. 4:16-cv-02268-PJH
21)
22) Plaintiffs,) PLAINTIFFS' NOTICE OF MOTION AND
23) vs.) MOTION TO REMAND; MEMORANDUM
24)) OF POINTS AND AUTHORITIES IN
25) SUPPORT THEREOF
26)
27) SUNEDISON, INC., et al.,) DATE: August 10, 2016
28) Defendants.) TIME: 9:00 a.m.
29)) CTRM: 3, 3rd Floor

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NOTICE OF MOTION AND MOTION

TO THE COURT, THE PARTIES, AND ALL COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that, on August 10, 2016, at 9 a.m., before the Honorable Phyllis J.
4 Hamilton, Plaintiffs Omega Capital Investors, L.P., Omega Capital Partners, L.P., Omega Equity
5 Investors, L.P. and Omega Overseas Partners, Ltd. (“Plaintiffs” or “Omega”) will move pursuant to
6 28 U.S.C. §§1452(a), 1452(b), and 1447(c) to remand this action to the Superior Court of the State
7 of California, County of San Mateo (“San Mateo Superior Court”). This motion is based on this
8 Notice of Motion and Motion and supporting Memorandum, the Declaration of Jennifer N. Caringal
9 Support and accompanying exhibits (“Caringal Decl.”), the proposed order, all pleadings and papers
10 on file with the Court, any oral argument of counsel at the hearing, and any additional matters
11 submitted at the hearing.

ISSUE TO BE DECIDED

13 1. Should this case be remanded to the Superior Court of California, San Mateo County,
14 because removal is barred by the Securities Act of 1933, the claims asserted are unrelated to any
15 bankruptcy, or equitable grounds warrant remand?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 Plaintiffs Omega Capital Investors, L.P., Omega Capital Partners, L.P., Omega Equity
4 Investors, L.P. and Omega Overseas Partners, Ltd. (“Plaintiffs”) commenced this securities action in
5 San Mateo Superior Court on March 30, 2016) (the “Action”). Dkt. No. 1-1. On April 26, 2016,
6 Defendants¹ improperly removed to this Court under 28 U.S.C. §1452(a), which only authorizes
7 removal of claims “related to” bankruptcy proceedings. As explained below, the claims in this
8 action are not “related to” any bankruptcy proceedings, and, in any event, the Securities Act of 1933
9 (“1933 Act”) bars removal. Moreover, even if related and not barred, equity would still warrant
10 remand. Accordingly, Plaintiffs respectfully request that the Court grant this motion and remand this
11 action to San Mateo Superior Court.

12 | II. BACKGROUND

13 The Action seeks to recover losses Plaintiffs suffered in connection with their purchases of
14 SunEdison, Inc. (“SunEdison”) and TerraForm Global, Inc. (“TerraForm Global”) securities
15 pursuant to various offerings completed between June 2015 and August 2015. ¶¶1, 107.² Plaintiffs
16 allege that SunEdison told investors that it had sufficient existing sources of capital to acquire and
17 develop renewable energy projects at levels to support dividend and growth estimates that
18 Defendants disseminated, while omitting material facts, including that at the time of the offerings:
19 (i) SunEdison’s liquidity position and borrowing capacity had deteriorated significantly;
20 (ii) SunEdison had breached debt covenants in one of its borrowing agreements, requiring the

¹ The defined “Defendants” are: SunEdison, Inc., TerraForm Global, Inc. Ahmad Chatila, Brian Wuebbels, Carlos Domenech Zornoza, Martin Truong, Jeremy Avenier, Alejandro Hernandez, Emmanuel Hernandez, Antonio R. Alvarez, Peter Blackmore, Clayton Daley Jr., Georganne Proctor, Steven Tesoriere, James B. Williams, Randy H. Zwirn, Goldman, Sachs & Co., J.P. Morgan Securities LLC, Barclays Capital Inc., Citigroup Global Markets Inc., Morgan Stanley & Co. LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Deutsche Bank Securities Inc., BTG Pactual US Capital LLC, Macquarie Capital (USA), Inc., MCS Capital Markets LLC and Does 1-25, inclusive.

²⁷ ² ¶ refers to paragraphs in Plaintiffs' Complaint for Violations of the Securities Act of 1993
²⁸ and State Law (the "Complaint"), attached as Exhibit 1 to Defendants' Notice of Removal (Dkt. No. 1).

1 company to post hundreds of millions of dollars in collateral; and (iii) SunEdison had, out of
 2 desperation, borrowed \$169 million at an effective interest rate of 15%. ¶3.

3 The Complaint asserts three non-removable causes of action pursuant to the 1933 Act and
 4 four state law causes of action based on untrue statements of material fact in and omissions of
 5 material facts from the offering materials issued in connection with various offerings by SunEdison
 6 and TerraForm Global between June and August 2015. ¶¶135, 164, 176, 181, 208, 223 and 236.³

7 On April 21, 2016, SunEdison filed a voluntary petition for bankruptcy in the United States
 8 Bankruptcy Court for the Southern District of New York (“SunEdison Bankruptcy Case”). Dkt.
 9 No. 1, ¶13. All proceedings against SunEdison are thus stayed pursuant to 11 U.S.C. §362(a).

10 Although §22 of the 1933 Act (15 U.S.C. §77v) expressly bars removal of an action brought
 11 in state court pursuant to the 1933 Act, on April 26, 2016, Defendants improperly removed this
 12 Action to the Northern District of California. Defendants’ Notice of Removal claims that this Action
 13 is “related to” the SunEdison Bankruptcy Case under 28 U.S.C. §1452(a), and that this Court has
 14 original jurisdiction pursuant to 28 U.S.C. §1334(b). Dkt. No. 1, ¶1.

15 On May 9, 2016, Defendants sought to relate this Action to ten other actions that ostensibly
 16 concerned SunEdison’s bankruptcy. The Court granted Defendants’ motion to relate seven of the
 17 eleven cases.⁴ This Action was not related to those seven cases. An unopposed motion to relate this

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 22 ³ Plaintiffs assert these causes of action against SunEdison, TerraForm Global, Inc.
 23 (“TerraForm Global”), certain officers and directors of both entities, the placement agents for
 24 TerraForm Global’s Class D securities offering and the underwriters for the various offerings.

25 ⁴ Order Granting in Part and Denying in Part Defendant TerraForm Global, Inc.’s
 26 Administrative Motion to Consider Whether Cases Should Be Related. Dkt. No. 27. The following
 27 actions were related: *Oklahoma Firefighters Pension and Retirement System v. SunEdison, Inc., et*
al., Case No. 3:16-cv-02267-TEH; *Anton S. Badri v. TerraForm Global, Inc., et al.*, Case No. 3:16-
cv-02269-WHO; *Iron Workers Mid-South Pension Fund v. TerraForm Global, Inc., et al.*, Case No. 3:16-
cv-02270-EMC; *Mitesh Patel v. TerraForm Global, Inc., et al.*, Case No. 3:16-cv-02272-
WHA; *Simon Fraser v. TerraForm Global, Inc., et al.*, Case No. 3:16-cv-02273-LHK; *Beltran v.*
TerraForm Global, Inc., et al., Case No. 5:15-cv-04981; *Pyramid Holdings, Inc. v. Terraform*
Global, Inc., et al., Case No. 5:15-cv-05068-BLF.

1 case with three other removed cases is pending in *Cobalt Partners, L.P., et al., v. SunEdison, Inc., et*
 2 *al.*, No. 3:16-cv-02263-WHA.⁵

3 **III. ARGUMENT**

4 District courts are courts of limited jurisdiction, and thus, in every case, ““the first and
 5 fundamental question is that of jurisdiction.”” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83,
 6 94 (1998). Removal is disfavored. *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d
 7 1031 (9th Cir. 2008).⁶ “The ‘strong presumption’ against removal jurisdiction means that the
 8 defendant always has the burden of establishing that removal is proper.” *Gaus v. Miles*, 980 F.2d
 9 564, 566 (9th Cir. 1992). “Federal jurisdiction must be rejected if there is any doubt as to the right
 10 of removal in the first instance.” *Id.*

11 **A. Removal of this Action is Expressly Prohibited Under the 1933 Act**

12 The plain language of the 1933 Act, as amended by the Securities Litigation Uniform
 13 Standards Act of 1998 (“SLUSA”), expressly prohibits removal: “no case arising under this
 14 subchapter and brought in any State court of competent jurisdiction shall be removed to any court of
 15 the United States.” 15 U.S.C. §77v(a). Section 22(a) is a specific statutory provision of the 1933
 16 Act that bars removal of 1933 Act actions. The *only* exception to this express removal bar applies to
 17 certain class actions and is not relevant here. 15 U.S.C. §77p(c); *see Rajasekaran v. CytRx Corp.*,
 18 No. CV 14-3406-GHK (PJWx), 2014 U.S. Dist. LEXIS 124550, at *8 (C.D. Cal. Aug. 21, 2014)
 19 (“[O]nly covered class actions based upon state law . . . can be removed to federal court. . . .
 20 Nothing in the plain language of the statute suggests that SLUSA created any other basis for removal
 21 beyond this narrow exception . . .”). This Action is not a class action. Section 22(a)’s express
 22 removal bar requires remand.

23 Notwithstanding §22(a)’s express prohibition on removal, Defendants assert that §1452’s
 24 broad grant of removal power – which applies to any action arising in or related to bankruptcy –

25 _____
 26 ⁵ The other two cases are *Glenview Capital Partners, L.P. et al. v. SunEdison, Inc. et al.*, Case
 27 No. 3:16-cv-02264-VC and *Charles Bloom and Sharon Burnstein v. SunEdison, Inc., et al.*, Case No.
 3:16-cv- 02265-RS.

28 ⁶ All emphasis added and citations and footnotes omitted unless otherwise indicated.

1 provides for removal of this Action. Dkt. No. 1, ¶¶30-31. Under §1452, an action may be removed
 2 if it is “related to” a pending bankruptcy action. As a result, Defendants assert that this Court has
 3 original jurisdiction over this Action pursuant to 28 U.S.C. §1334(b). Dkt. No. 1, ¶1.

4 However, “[i]t is a basic principle of statutory construction that a statute dealing with a
 5 narrow, precise, and specific subject is not submerged by a later enacted statute covering a more
 6 generalized spectrum.” *Luther*, 533 F.3d at 1034 (quoting *Radzanower v. Touche Ross & Co.*, 426
 7 U.S. 148, 153 (1976)). Thus, removal is improper where a specific non-removal statute is
 8 applicable, for “[w]hen Congress has ‘wished to give plaintiffs an absolute choice of forum, it has
 9 shown itself capable of doing so in unmistakable terms.” *Breuer v. Jim’s Concrete of Brevard, Inc.*,
 10 538 U.S. 691 (2003).

11 In *Luther*, defendants removed an action alleging 1933 Act claims to federal court under the
 12 Class Action Fairness Act of 2005 (“CAFA”), despite §22(a)’s express bar on removal. 533 F.3d at
 13 1032-33. As contrasted with CAFA’s general removal grant, the Ninth Circuit held that “the
 14 Securities Act of 1933 is the more specific statute; it applies to the narrow subject of securities cases
 15 and §22(a) more precisely applies only to claims arising under the Securities Act of 1933.” *Id.* at
 16 1034. Since CAFA applied to a “generalized spectrum” of class actions, §22(a)’s specific
 17 prohibition on removal resulted in the non-removal provision prevailing over CAFA’s removal
 18 provision, leading the Ninth Circuit to affirm the district court’s remand. *Id.* This analysis applies
 19 with equal force here with respect to §1452.

20 Section 22(a) is a more specific statute than §1452, and its non-removal provision prevails
 21 over §1452’s general removal provision. *Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, No. 3:03-0128,
 22 2003 U.S. Dist. LEXIS 10266 (M.D. Tenn. May 12, 2003) is instructive. There, an action asserting
 23 1933 Act claims was filed in a Tennessee state court. Likewise here, defendants removed the action
 24 under §1334(b)’s federal bankruptcy jurisdiction statute and §1452’s bankruptcy removal statute. *Id.*
 25 at *3. Recognizing the tension between §22(a)’s express non-removable provision and the general
 26 removal provisions of §§1334(b) and 1452, the district court noted the Supreme Court’s holding that
 27 “a specific statute controls over a general one without regard to priority of enactment.” *Id.* at *7-*8
 28 (quoting *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961)). Given that §22(a) “is a

1 clear statutory prohibition” on removal, the district court found that the “relevant rule of statutory
 2 construction requires that Section 22(a), as amended, control over 28 U.S.C. §§1334(b) and 1452,
 3 general statutes.” *Id.* at *10.

4 District courts around the country have similarly concluded that §22(a)’s specific removal
 5 prohibition trumps the general removal provisions of §1452. *See, e.g., Ill. Mun. Ret. Fund v.*
 6 *Citigroup, Inc.*, No. 03-465-GPM, 2003 U.S. Dist. LEXIS 16255, at *6 (S.D. Ill. Sept. 9, 2003)
 7 (“[T]he rules of statutory construction require Section 22(a) to control over the more general
 8 provisions of 28 U.S.C. §§1334(b) and 1452. . . . The only way to give effect to the legislative intent
 9 behind its enactment is to construe it as a bar to removal”); *City of Birmingham Ret. & Relief*
 10 *Fund v. Citigroup, Inc.*, No. CV-03-BE-0994-S, 2003 U.S. Dist. LEXIS 14066, at *8-*9 (N.D. Ala.
 11 Aug. 12, 2003) (same); *Ariail Drug Co., Inc. v. Lease Partners Corp.*, No. CIV. A. 96-G-0708-S,
 12 1996 WL 1060890, at *5 (N.D. Ala. May 23, 1996) (“This case is nonremovable by force of statute
 13 and is also due to be remanded in the best interest of justice and equity.”).⁷

14 Even if §22(a) were not more specific than §1452, §22(a)’s bar on removal prevails for a
 15 separate reason – it was the later enacted statute. *Radzanower*, 426 U.S. at 153 (where two statutes
 16 are in irreconcilable conflict, courts must give effect to the most recently enacted statute as it is the
 17 most recent indication of congressional intent). Section 22(a)’s express prohibition on removal was
 18 originally enacted in 1933. However, §22(a) was revamped in 1998 in order to carve out an express
 19 exception to §22(a)’s prohibition on removal. *Tenn.*, 2003 U.S. Dist. LEXIS 10266, at *9. The
 20 changes to §22(a) implicated only class actions, leaving §22(a)’s non-removal mandate intact. *Id.* at
 21 *9-*10. Congress’s “comprehensive reexamination and significant amendment” to an existing law
 22 “is itself evidence that Congress affirmatively intended to preserve [it].” *Merrill Lynch, Pierce,*
 23 *Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982); *see also In re Waste Mgmt., Inc., Sec.*
 24 *Litig.*, 194 F. Supp. 2d 590, 596 (S.D. Tex. 2002) (“there is no express statement by Congress that it

25
 26 ⁷ Courts have repeatedly rejected attempts at removing cases under §1452 in the face of other
 27 more specific statutes expressly prohibiting removal. *See, e.g., Kinder v. Wis. Barge Line, Inc.*, 69
 28 B.R. 11, 12 (E.D. Mo. 1986) (express nonremoval provision of Jones Act overrides claim of “related
 to” jurisdiction under §1452); *McRae v. Lykes Bros. S.S. Co.*, No. 98-3240 SECTION “G”, 1998
 U.S. Dist. LEXIS 20132, at *4 (E.D. La. Dec. 22, 1998) (same).

1 was modifying the traditional rule prohibiting removal of cases brought under the 1933 Act"). As a
 2 result, the district court in *Tenn.* found that §22(a) controlled over §1452, which was enacted
 3 fourteen years prior to the 1998 amendments to §22. *Id.* at *10.⁸

4 Defendants rely on the Second Circuit's decision in *WorldCom*, 368 F.3d at 108 to contend
 5 that §22(a) does not bar removal of this Action. Dkt. No. 1, ¶31. However, what is clear from the
 6 Ninth Circuit's holding in *Luther* and the Second Circuit's holding in *WorldCom* is that the two
 7 Circuits have taken different approaches in determining whether one statute is more specific than
 8 another. In *WorldCom*, the Second Circuit found that both §22(a) and §1452 cover a defined class of
 9 claims, with neither statute covering a subset of claims covered by the other. 368 F.3d at 102.
 10 Because §22(a) applies to many claims that are not "related to" a bankruptcy and thus did not apply
 11 to a subset of §1452, the Second Circuit held §22(a) was not any more specific than §1452. *Id.*
 12 Thus, in the view of the Second Circuit, a specific statute can only prevail over a general statute
 13 where the specific statute is a subset of the general statute. By contrast, four years after *WorldCom*,
 14 the Ninth Circuit in *Luther* took a different approach. It was not relevant to the Ninth Circuit that
 15 §22(a) was not a subset of CAFA. Instead, the Ninth Circuit held that §22(a) specifically only
 16 applies to claims arising under the 1933 Act, whereas CAFA applies to a "generalized spectrum"
 17 of class actions. *Luther*, 533 F.3d at 1034. Because §22(a) is the more specific statute, it prevailed
 18 over CAFA's removal provision. *Id.*

19 It is for this reason that Defendants' reliance on *Fed. Home Loan Bank of San Francisco v.*
 20 *Deutsche Bank Sec.* ("FHLB"), No. 10-3093 SC, 2010 U.S. Dist. LEXIS 138564 (N.D. Cal. Dec. 20,
 21 2010) is misplaced. In *FHLB*, the Court acknowledged the conflict between §22(a) and §1452 and
 22 the conflicting authorities amongst various district courts. *Id.* at *16-*17. Ultimately, the Court in
 23 *FHLB*, however, chose not to follow the Ninth Circuit's decision in *Luther*, summarily dismissing it
 24

25 ⁸ The court in *Tenn.* rejected Judge Cote's decision *In re WorldCom Sec. Litig.*, No. 02 Civ.
 26 3288 (DLC) 2003 U.S. Dist. LEXIS 2791 (S.D.N.Y. Mar. 3, 2003), which held that because §1452
 27 was enacted decades after §22(a)'s initial enactment in 1933, Congress could have included an
 28 exception to incorporate 1933 Act claims, but did not. *Tenn.*, 2003 U.S. Dist. LEXIS 10266, at *10
 n.2. The district court in *Tenn.* correctly held that the 1998 amendments to the 1933 Act was the
 relevant guidepost in comparison with §1452, not the 1933 version. Cf. *Cal. Pub. Emps.' Ret. Sys. v.*
WorldCom, Inc., 368 F.3d 86, 104-05 (2d Cir. 2004).

1 because it dealt with §22(a)'s interplay with CAFA as opposed to §22(a)'s interplay with §1452.
 2 533 F.3d at 1031. For purposes of the Ninth Circuit's statutory construction analysis, this is a
 3 distinction without a difference. The relevant point here is that *FHLB* overlooks the difference in
 4 analysis in this Circuit as compared to the Second Circuit when dealing with the doctrine of
 5 specificity. *FHLB* thereby provides little help to Defendants. 2010 U.S. Dist. LEXIS 138564, at
 6 *17-*18.⁹ In the Ninth Circuit a "general grant of the right of removal . . . does not trump §22(a)'s
 7 specific bar to removal of cases arising under the Securities Act of 1933." *Luther*, 533 F.3d at 1034.

8 **B. This Action Is Not "Related To" the Bankruptcy Proceeding**

9 Even if §22(a)'s express non-removal provision did not apply here, which it does, this Action
 10 is not as Defendants contend, "related to" the SunEdison Bankruptcy Case. The Ninth Circuit has
 11 adopted the Third Circuit's test in determining whether an action is "related to" a bankruptcy
 12 proceeding. *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988) (adopting the Third Circuit's formulation
 13 of "related to" as set forth in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). That is,
 14 "[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities,
 15 options, or freedom of action (either positively or negatively) and which in any way impacts upon
 16 the handling and administration of the bankrupt estate." *Id.*

17 The "test articulated in *Pacor* for whether a lawsuit could 'conceivably' have an effect on the
 18 bankruptcy proceeding inquires whether the allegedly related lawsuit would affect the bankruptcy
 19 proceeding without the intervention of yet another lawsuit." *In re Federal-Mogul Global, Inc.*, 300
 20 F.3d 368, 382 (3d Cir. 2002). Thus, "the mere fact that there may be common issues of fact between
 21 a civil proceeding and a controversy involving the bankruptcy estate does **not** bring the matter within
 22 the scope of [federal bankruptcy jurisdiction]." *Pacor*, 743 F.2d at 994. For good reason, "a
 23

24 ⁹ Similarly, in its order denying plaintiffs' motion to remand in *Luther v. Countrywide Fin. Corp.*, No. 12-cv-5125 MRP (MANx), Order Re: Plaintiffs' Motion to Remand (C.D. Cal. Aug. 31, 2012) ("*Luther II*") (Caringal Decl., Exhibit 1), the court in *Luther II* latched on to the Second Circuit's decision in *WorldCom* without recognizing the stark difference in analysis between the Second Circuit and the Ninth Circuit's approach in *Luther*. *Luther II* at 4-5. Instead, Judge Pfaelzer discounted *Luther* since it concerned CAFA and not §1452. *Luther II* at 4-5. Defendants' reliance on *Carpenters Pension Tr. for S. Cal. v. Ebbers*, 299 B.R. 610 (C.D. Cal. 2003) is also misplaced, which was decided prior to the Ninth Circuit's decision in *Luther* and therefore inapt.

1 bankruptcy court's 'related to' jurisdiction cannot be limitless." *Celotex Corp. v. Edwards*, 514 U.S.
 2 300, 308 (1995).

3 While *Pacor* gave a fairly broad reading to "related to" jurisdiction, the Third Circuit in its
 4 opinion in fact concluded that the district court had properly remanded the case due to the lack of
 5 subject matter jurisdiction, and for reasons which are applicable to, if not dispositive of, this motion.
 6 743 F.2d at 994-95. In *Pacor*, the defendant brought a third party complaint against the Johns
 7 Manville Corporation which thereafter filed for Chapter 11 protection. Defendant removed the case
 8 on related to jurisdictional grounds and in affirming the decision to remand the matter, the Third
 9 Circuit held that *Pacor*'s contingent claims for indemnification did not trigger related to jurisdiction.
 10 First, it noted, the plaintiff would have to succeed on its claims and only then could the defendant
 11 bring a claim against the debtor for indemnification. However, because of the bankruptcy stay the
 12 debtor was not a party to the suit and so the court hearing the case "could not determine any rights,
 13 liabilities or course of action of the debtor." *Id.* at 995. A second litigation would be needed to
 14 determine the merits of the indemnification type claims.

15 The actual holding in *Pacor* is that in a case between non-debtors federal courts cannot
 16 exercise related to jurisdiction based on the fact that the defendant has potential indemnification type
 17 claims against a debtor. A second judicial proceeding would be needed to establish whether these
 18 claims have merit and according to *Pacor* this means that there is no federal jurisdiction over the
 19 pending state court action.

20 Here, Defendants premise "related to" jurisdiction on no more than speculative claims of
 21 indemnification (Dkt. No. 1, ¶¶19, 27-29), contribution (Dkt. No. 1, ¶¶19-24), and insurance
 22 coverage (Dkt. No. 1, ¶¶19, 25). Indeed, under Defendants' read, **any** potential claim by **any** party
 23 against **any** debtor, no matter how speculative, unliquidated, or immaterial, would warrant removal
 24 to federal court. This is not the law.

25 As many courts have explained, in the securities litigation context, potential indemnification
 26 and contribution claims generally do not support "'related to'" jurisdiction because they are "at best,
 27 a precursor to further litigation over the indemnity agreement." *Ret. Sys. of Ala. v. J.P. Morgan*
 28 *Chase & Co.*, 285 B.R. 519, 527 (M.D. Ala., 2002); *see also Ret. Sys. of Ala. v. Merrill Lynch &*

1 *Co.*, 209 F. Supp. 2d 1257, 1264, 1266 (M.D. Ala. 2002) (“*Ret. Sys. of Ala. II*”) (collecting cases);
 2 *Wise v. Travelers Indem. Co.*, 192 F. Supp. 2d 506, 514-17 (N.D. W. Va. 2002); *In re Asbestos*
 3 *Litig.*, No. CV 01-1790-PA, 2002 WL 649400, at *4 (D. Or. Feb. 1, 2002); *Armstrong v. Honeywell*
 4 *Int’l, Inc.*, 198 F. Supp. 2d 899, 900 (S.D. Tex. 2002); *In re Videocart, Inc.*, 165 B.R. 740, 744
 5 (Bankr. D. Mass. 1994); *Da Silva v. Am. Sav.*, 145 B.R. 9, 12 (S.D. Tex. 1992). Just so here. The
 6 validity of Defendants’ purported indemnification agreements depend on a host of wholly untested
 7 findings - at bottom, fact-specific issues of contract formation and scope – that in turn must depend
 8 on as of yet uninitiated litigation, separate and apart from this action. Because these necessary
 9 predicate findings remain unsubstantiated, Defendants’ purported indemnification agreements do not
 10 establish jurisdiction under §1452. *See, e.g., In re ACI-HDT Supply Co.*, 205 B.R. 231, 237-38
 11 (B.A.P. 9th Cir. 1997) (no related to jurisdiction because “no evidentiary record was developed to
 12 indicate what effect the state law claims might have on [the] bankruptcy estate”); *Foster Poultry*
 13 *Farms, Inc. v. IBM Corp.*, No. CIV-F-06-0680 AWI SMS, 2006 WL 2769944, at *9 (E.D. Cal.
 14 Aug. 1, 2006) (“In examining whether jurisdiction exists, the removing party must provide some
 15 evidence that there is a nexus between the case and the bankruptcy estate.”); *In re Asbestos Litig.*,
 16 No. CV 01-1790-PA, 2002 WL 649400, at *4 (D. Or. Feb. 1, 2002) (“Defendants, who have the
 17 burden of establishing jurisdiction . . . with . . . factual support . . . speculative, theoretical claims are
 18 not sufficient to show ‘related to’ bankruptcy jurisdiction.”).

19 But even if Defendants’ construction of the agreements proved correct, that would render the
 20 contracts illegal and thus unenforceable. In the seminal opinion *Globus v. Law Research Serv., Inc.*,
 21 418 F.2d 1276 (2d Cir. 1969), the Second Circuit held that allowing an underwriter, or any other
 22 defendant, to enforce such an indemnity agreement would violate the public policy underlying the
 23 securities laws, explaining as follows:

24 Civil liability under section 11 and similar provisions was designed not so
 25 much to compensate the defrauded purchaser as to promote enforcement of the Act
 26 and to deter negligence by providing a penalty for those who fail in their duties. And
 27 Congress intended to impose a “high standard of trusteeship” on underwriters . . .
 28 [u]nderwriters who knew they could be indemnified simply by showing that the
 issuer was “more liable” than they (a process not too difficult when the issuer is
 inevitably closer to the facts) would have a tendency to be lax in their independent
 investigations. Cases upholding indemnity for negligence in other fields are not

1 necessarily apposite. The goal in such cases is to compensate the injured party. But
 2 the [1933] Act is more concerned with prevention than cure.

3 *Id.* at 1288-89. *Globus* has been consistently followed throughout the federal courts, including the
 4 Ninth Circuit. *See, e.g., Laventhal, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 676
 5 (9th Cir. 1980) (denying indemnity for 1933 Act violations, “permitting indemnity would undermine
 6 the statutory purpose of assuring diligent performance of duty and deterring negligence”); *see also*
 7 *Eichenholtz v. Brennan*, 52 F.3d 478, 485 (3d Cir. 1995) (finding contractual indemnifications for
 8 negligence claims against the policy of the federal securities statutes) (citing cases); *Odette v.*
 9 *Shearson, Hammill & Co.*, 394 F. Supp. 946, 957 (S.D.N.Y. 1975) (denying indemnity for negligent-
 10 type violations).

11 Further, even were the indemnification agreements themselves valid and enforceable, the
 12 validity of any purported claim thereunder would still depend on numerous unresolved factual
 13 findings, *e.g.*, whether Defendants contributed any “untrue statements or omission(s)” incorporated
 14 into the Offering Documents, *see, e.g.*, Dkt. No. 1-3 at 19 (*Underwriting Agreement*, Section 9(a),
 15 “Indemnification and Contribution”), and thus could not suffice under §1452. *See Ret. Sys. of Ala.*,
 16 285 B.R. at 524, at *17.¹⁰ And even if assumed valid, Defendants’ potential claims would only
 17 affect the *allocation* of assets among competing creditors among *that class of creditors*, not the size
 18 of the asset pool. *In re Green*, 210 B.R. 556, 559 (Bankr. N.D. Ill. 1997) (citing *In re Salem Mills*,
 19 *Inc.*, 148 B.R. 505, 508 (Bankr. N.D. Ill. 1992)). Only where the indemnitor holds “property of the
 20 estate against which liability can be offset does the action unquestionably impact the assets of the
 21 estate.” *Salem Mills*, 148 B.R. at 508. Here, Defendants have made no such showing.¹¹

22

23 ¹⁰ Similarly, any contribution claim would remain wholly contingent on, *inter alia*, a finding of
 24 liability. *See, e.g., In re Am. Cont'l Corp.*, 119 B.R. 216, 218-19 (D. Ariz. 1990); *accord In re*
 25 *Walker*, 51 F.3d 562 (5th Cir. 1995) (rejecting “related to” jurisdiction on contribution claim).

26 ¹¹ Defendants rely on other plainly distinguishable authority. Dkt. No. 1, ¶27. In *Parke v.*
 27 *Cardsystems Sols., Inc.*, one of the defendants actually filed as creditor in the debtor bankruptcy
 28 proceeding, “demonstrating [a clear] vested interest in the available assets of the estate.” No. C 06-
 04857 WHA, 2006 U.S. Dist. LEXIS 77241, at *10 (N.D. Cal. Oct. 11, 2006). And in *Hendricks v.*
Detroit Diesel Corp., it was undisputed that the debtor agreed indemnify and in fact had already paid
 for defendant’s counsel. No. C-09-3939 EMC, 2009 WL 4282812, at *5 (N.D. Cal. Nov. 25, 2009).
 Here, Defendants have made no similar showing.

1 Further still, even if Defendants' potential indemnification agreements and claims thereunder
 2 were valid, enforceable, and could affect the size, not mere allocation, of the estate, any such claims
 3 would still be immaterial – at most millions of dollars plus defense costs – to the SunEdison
 4 bankruptcy estate, which according to its bankruptcy petition had as of September 30, 2015, \$20.7
 5 billion in assets and \$16.1 billion in liabilities. *See* SunEdison Bankruptcy Petition (Caringal Decl.,
 6 Ex. 2). Defendants are among the largest creditors of the ***unsecured*** creditors class. *Id.* Since
 7 unliquidated indemnity claims are ***not*** secured by property of the estate and in any event *de minimis*,
 8 *see Green*, 210 B.R. at 559, they do not warrant jurisdiction under §1452. *See Ret. Sys. of Ala.*, 285
 9 B.R. at 524, 526.

10 Yet, even assuming Defendants' claims were substantiated, legal, and material, they would
 11 be disallowed under 11 U.S.C. §502(e)(1)(B) of the Bankruptcy Code. Section 502(e)(1)(B) states
 12 that the bankruptcy court "shall disallow any claim for reimbursement or contribution" that "is
 13 contingent." 11 U.S.C. §502 (e)(1), (e)(1)(B). In other words, Defendants would need to both await
 14 a perfected judgment against them ***and pay it*** before they can turn to SunEdison for remuneration.
 15 *In re Drexel Burnham Lambert Grp. Inc.*, 148 B.R. 982, 987 (Bankr. S.D.N.Y. 1992). The relevant
 16 section automatically disallows reimbursement, indemnity, or contribution claims that are contingent
 17 at the time of disallowance. *The Aetna Cas. & Sur. Co. v. Ga. Tubing Corp.*, 93 F.3d 56, 57 (2d Cir.
 18 1996). This means that "[n]o payment can be made to a principal creditor [i.e., defendants] by one
 19 secondarily liable [SunEdison] until liability has been determined." *In re Pacor, Inc.*, 110 B.R. 686,
 20 689 (E.D. Pa. 1990). This is because "the causes of action in the underlying lawsuit assert claims
 21 upon which, if proven, the debtor could be liable." *In re Wedtech Corp.*, 85 B.R. 285, 290 (Bankr.
 22 S.D.N.Y. 1988). As such, Defendants have "no right to share in the distribution of the debtor's
 23 assets until such time as the creditor's claim shall have been paid in full." " *In re Pacor*, 110 B.R. at
 24 690; *see also Greatamerican Fed. Sav. & Loan Ass'n v. Adcock Excavating, Inc.*, No. 89 C 3794,
 25 1990 U.S. Dist. LEXIS 4348, at *7 (N.D. Ill. Apr. 16, 1990) (indemnity claims disallowed unless
 26 obligation upon which contribution is sought has been paid); *In re Ecco D'Oro Food Corp.*, 249
 27 B.R. 300, 302 (Bankr. N.D. Ill. 2000) (claim not allowed until underlying creditor is paid by party
 28 seeking contribution).

1 For many of these same reasons, potential legal fees do not support ““related to”” jurisdiction.
 2 *See Ret. Sys. of Ala.*, 285 B.R. at 524. The proceeds of a purported D&O insurance policy are not
 3 property of the estate. *In re MF Glob. Holdings Ltd.*, 515 B.R. 193, 203 (Bankr. S.D.N.Y. 2014)
 4 (“when a policy ‘provides the debtor with indemnification coverage but indemnification either has
 5 not occurred, is hypothetical, or speculative, the proceeds are not property of the bankruptcy
 6 estate’”). Defendants’ entitlement to legal fees under any such policy depends on wholly unresolved
 7 questions of fact, *e.g.*, whether Defendants are responsible for misrepresentations in the Offering
 8 Documents.¹² And even if so entitled, the amount of any legal fees would be immaterial to
 9 SunEdison’s bankruptcy estate. *See Green*, 210 B.R. at 559.

10 Finally, Defendants cannot premise “related to” jurisdiction upon SunEdison’s
 11 responsibilities to or ownership interest in TerraForm Global because, for the purposes of
 12 jurisdiction here, there is no “identity of interests” between the two. *Cf.* Dkt. No. 1, ¶26. An
 13 “identity of interests” can only exist in “a suit against a third-party who is entitled to **absolute**
 14 **indemnity** by debtor.” *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986). Here, there
 15 is no “absolute” indemnity by the SunEdison, and thus no ““related to”” jurisdiction under §1452.
 16 *Ret. Sys. of Ala.*, 285 B.R. at 524, 529.

17 **C. Equitable Grounds Require Remand Under 28 U.S.C. §1452(b)**

18 Regardless of whether §1452 trumps §22(a), which it does not, or even if this Action is
 19 “related to” the SunEdison Bankruptcy Case, which it is not, this Court should remand this Action
 20 under §1452’s equitable grounds.¹³

21 Under §1452 the Court “may remand such claim or cause of action on any equitable ground.”
 22 28 U.S.C. §1452(b). Section 1452(b) affords “an unusually broad grant of authority.” *In re Roman*
 23

24 ¹² Defendants’ cited authority is inapposite. In *Stichting Pensioenfonds ABP v. Countrywide*
 25 *Fin. Corp.* and similar cases (*see* Dkt. No. 1, ¶29), Defendants were parties to mortgage-backed
 26 security actions wherein partial originators of underlying loans had indisputably agreed to cover
 27 ““any loss[],”” a right to that “arose immediately upon the filing” and thus did not, as here, depend
 28 on disputed issues of fact or the filing of “another separate lawsuit.” *See, ABP*, 447 B.R. 302, 309
 (C.D. Cal. 2010).

29 ¹³ *See, e.g., FHLB*, 2010 U.S. Dist. LEXIS 138564, at *33-*37 (Judge Conti remanding on
 30 equitable grounds after finding action was “related to” bankruptcy proceeding).

1 *Catholic Bishop of San Diego*, 374 B.R. 756, 761 (Bankr. S.D. Cal. 2007); *see also Cardsystems*,
 2 2006 U.S. Dist. LEXIS 77241 (identifying non-exclusive list of factors in determining remand on
 3 equitable grounds).

4 As discussed above, this Action will have no direct effect on the bankruptcy estate. The
 5 Action is stayed as to SunEdison, and the remaining entities and/or individuals are all non-debtors.
 6 This Action does not involve any “core” bankruptcy matters – which Defendants do not contest –
 7 and thus, the connection to the New York bankruptcy proceedings is remote. Dkt. No. 1 at ¶32; *see*
 8 *Charles Schwab Corp. v. BNP Paribas Sec.*, No. C 10-0430 SI, 2011 U.S. Dist. LEXIS 22322,
 9 at *14 (N.D. Cal. Feb. 23, 2011). Thus, even if the Court were to conclude that the action is
 10 technically “related to” the bankruptcy proceeding (plaintiffs dispute that it is, as discussed above),
 11 any relationship with the proceeding would be exceedingly weak. This alone supports remand under
 12 equitable grounds. *See Cardsystems*, 2006 U.S. Dist. LEXIS 77241, at *13-*14 (“effect of the action
 13 on the administration of the bankruptcy estate” and “relatedness or remoteness of the action to the
 14 bankruptcy case” are factors supporting equitable remand); *see also Fed. Home Loan Bank of Seattle*
 15 *v. Barclays Capital, Inc.*, No. C10-0139 RSM, 2010 U.S. Dist. LEXIS 102391, at *20 (W.D. Wash.
 16 Sept. 1, 2010) (“**Any one** of the seven relevant factors may provide a sufficient basis for equitable
 17 remand.”).

18 Equitable remand is further supported by the prejudice that would result from depriving
 19 plaintiffs of their chosen forum and subjecting them to the delays that will result from maintaining
 20 this action in federal court. *See Cardsystems*, 2006 U.S. Dist. LEXIS 77241, at *13 (“prejudice to
 21 the party involuntarily removed from state court” may support equitable remand); *Thomas v. Global*
 22 *Vision Prods.*, No. C 08-5581, 2009 U.S. Dist. LEXIS 27486 at *5 (N.D. Cal. Mar. 20, 2009) (delay
 23 in proceedings factored into warranting remand); *see also The Fair v. Kohler Die & Specialty Co.*,
 24 228 U.S. 22, 25 (1913) (“[T]he party who brings a suit is master to decide what law he will rely upon
 25 and therefore does determine whether he will bring a ‘suit’”).

26 This action can and will proceed more rapidly in state court, where the action is not subject to
 27 the discovery stay or other procedural requirements and delays imposed under the Private Securities
 28 Litigation Reform Act, 15 U.S.C. §77z-1. Moreover, Defendants have acknowledged that removal

1 to federal court was merely the first of a series of tactical maneuvers they intend to take to maneuver
 2 this case from Plaintiffs' chosen forum to *their* desired forum in the Southern District of New York,
 3 where they hope to take further tactical actions to force this and other cases to be coordinated with
 4 the unrelated proceedings in the bankruptcy court.¹⁴ Defendants still have yet to file their motion to
 5 transfer this case to the Southern District of New York.¹⁵ Dkt. No. 28 at 4.

6 Defendants have already delayed briefing on dispositive motions in this case and attempted
 7 to do so in two other cases as well. Defendants' tactical objective appears to be to delay the
 8 prosecution of this and numerous other unrelated cases, in the hopes that all of the cases can
 9 eventually be forced into a coordinated proceeding overseen by the bankruptcy court. But there is no
 10 basis for such coordination, because the actions Defendants seek to transfer involve separate groups
 11 of actions raising distinct types of claims that are unrelated to each other or to the bankruptcy.
 12 Indeed, it was for this precise reason that Judge Freeman denied Defendants' motion to relate this
 13 case with other actions on behalf of different investors asserting different claims under a different
 14 stock offering. *See* Dkt. No. 27. Now Defendants attempt to revisit that decision by transferring
 15 these actions and the unrelated cases to New York, where they will seek to relate them to still *more*
 16 proceedings asserting different claims on behalf of different parties and raising issues whose
 17 differences with this action are just as stark, if not more so. Defendants' apparent efforts to
 18 coordinate this and numerous other unrelated proceedings appears to have as its primary motive an
 19

20 ¹⁴ This is not Defendants' first attempt at delay-by-removal. Defendants' willingness to cause
 21 needless delay through improper removal is underscored by the fact that they previously removed
 22 four cases asserting 1933 Act claims against SunEdison and TerraForm Global even though "[s]ince
 23 2013, . . . every court in this district . . . has granted remand" with respect to such claims. *Plymouth*
 24 *Cty. Ret. Sys. v. Model N, Inc.*, No. 14-cv-4516-WHO, 2015 U.S. Dist. LEXIS 1104, at *8 (N.D. Cal.
 25 Jan. 5, 2015). All of the previously removed cases were remanded, including one accompanied by
 26 an award of attorneys fees. *See, e.g., Patel v. TerraForm Global, Inc.*, No. 5:16-cv-00073-BLF,
 27 Order Granting Plaintiff's Motion to Remand and Granting Plaintiff's Request for Fees (N.D. Cal.
 28 Mar. 3, 2016) (finding attorneys' fees and costs warranted, noting that counsel for defendants
 litigated the same issue in the Northern District of California three times over the past four years,
 with the matter remanded every time).

29 ¹⁵ Remanding this case back to state court would render Defendants' motion to transfer moot.
 30 *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc.*, No. SA CV 15-0687-DOC (DFMx), 2015 U.S.
 31 Dist. LEXIS 75355, at *13 (C.D. Cal. June 10, 2015) ("Most courts, when faced with concurrent
 32 motions to remand and transfer, resolve the motion to remand prior to, and/or to the exclusion of, the
 33 motion to transfer.").

1 effort to delay adjudication of this action on its merits for the benefit of no one, except, perhaps, the
2 Defendants.

3 Remanding this case to state court will prevent Defendants from engaging in these procedural
4 maneuvers designed solely to provide them with perceived tactical advantages, and will avoid
5 months of needless delay that will severely prejudice Plaintiffs. *See Glob. Vision*, 2009 U.S. Dist.
6 LEXIS 27486, at *5 (delay in proceedings factored into warranting remand); *see Ariail*, 1996 WL
7 1060890, at *4 (remand may be refused where case could *not* be timely adjudicated in the state
8 court).

9 Accordingly, for all of these reasons, if the Court concludes that remand is not required under
10 28 U.S.C. §1452(a), it should nevertheless exercise its discretion to abstain from exercising
11 jurisdiction and remand this case on equitable grounds pursuant to 28 U.S.C. §1452(b).

12 **IV. CONCLUSION**

13 For the foregoing reasons, Plaintiffs respectfully request that the Court remand this Action to
14 the Superior Court for the State of California, County of San Mateo.

15 DATED: May 26, 2016

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CERTIFICATE OF SERVICE

2 I hereby certify that on May 26, 2016, I authorized the electronic filing of the foregoing with
3 the Clerk of the Court using the CM/ECF system which will send notification of such filing to the
4 e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I
5 caused to be mailed the foregoing document or paper via the United States Postal Service to the non-
6 CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 26, 2016.

s/ Jennifer N. Caringal
JENNIFER N. CARINGAL

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